

**COMMENTS OF EXXON MOBIL CORPORATION AND  
HELENA CHEMICAL COMPANY  
ON ADEQ RADD FOR CEDAR CHEMICAL CORPORATION SITE**

- 1. ExxonMobil and Helena Chemical Company Agree with the Draft RADD insofar as it follows the Analysis and Remedial Recommendations of the Feasibility Study Prepared by AMEC Geomatrix.**

ExxonMobil and Helena Chemical Company believe that the Current Conditions Report (“CCR”) and Facility Investigation Report (“FIR”) submitted to ADEQ by AMEC Geomatrix represent an accurate analysis of environmental conditions related to the Cedar Chemical Corporation Site. ADEQ approved the CCR and the FIR in their final form; and the Draft RADD appears to reaffirm that approval. *See* Draft RADD at p. 4.

The Feasibility Study submitted by AMEC Geomatrix assessed a comprehensive list of remedial alternatives that might be considered to address the environmental conditions identified in the CCR and FIR. ExxonMobil and Helena Chemical Company believe that the assessment of these remedial alternatives contained in the Feasibility Study is correct. The Draft RADD published by ADEQ proposes to adopt most of the remedial analysis and recommendations contained in the Feasibility Study. ExxonMobil and Helena Chemical Company agree with the Draft RADD insofar as it follows the analysis and adopts the remedial recommendations contained in the Feasibility Study. The Draft RADD published by ADEQ, however, departs in certain respects from the analysis and recommendations of the Feasibility Study. ExxonMobil and Helena Chemical Company disagree with the Draft RADD insofar as it departs from the analysis and recommendations of the Feasibility Study. In particular, the companies believe that the RADD failed to properly evaluate and apply the Risk Assessment analysis presented in the Feasibility Study.

**2. The Provisions of Section 11 of the Draft RADD are not relevant to remedy selection and should be deleted.**

The Draft RADD focuses almost entirely on a discussion of remedial alternatives. This focus on assessing remedial alternatives as the subject matter of the Draft RADD is entirely appropriate. One section of the RADD, however, strays from the subject of assessing remedial alternatives and purports to direct certain parties to begin taking steps to implement a remedy. Specifically, Section 11 of the Draft RADD directs undefined entities referred to as the “known PRPs” to develop a schedule for implementing the remedy:

**11. Schedule of Implementation**

**To help aide [sic] in the proceession of remedial activities, the known PRPs are to submit to ADEQ a schedule within sixty (60) days of finalization of the ADEQ RADD regarding this facility.** The schedule should give highest priority to implementation of the Drum Vault Removal (Remedial Alternative D1) and alluvial aquifer enhanced biodegradation (Remedial Alternative A3). Each remedy should be scheduled in a way to expedite implementation of all remedies.

**The known PRPs must submit a plan annually to evaluate monitoring data from the SVE and selected groundwater remedies.** An evaluation of the overall effectiveness of contaminant removal in soils and groundwater and review of the site risks must be conducted at 5-year intervals. (Emphasis supplied.)

ExxonMobil and Helena Chemical Company believe that Section 11 should be deleted in its entirety from the RADD for several reasons. First, questions regarding who should prepare an implementation schedule and when it should be prepared have no relevance to the purpose of the RADD. Second, if Section 11 is intended as a legitimate and meaningful command to take action, it fails to comply with any of the administrative, statutory, or constitutional prerequisites for the issuance of a lawful administrative order. Third, even if it followed the procedural requirements for an administrative order, Section 11 would be impermissibly vague. It is impossible to know who ADEQ has in mind when it uses the term “known PRPs.” Although a

RADD is not an appropriate place to attempt to address questions of legal liability, it is important to note that the Draft RADD does not even mention most of the parties who appear to have potential liability for at least some aspect of the remedial costs contemplated by the RADD. Nor does the Draft RADD acknowledge that the Remedial Action Trust Fund itself likely has a large and perhaps majority share of the liability for the remedial costs under Ark. Code Ann. § 8-7-513. Finally, there is nothing about the “command” contained in Section 11 that would allow a liable party to limit its efforts at implementation to the specific elements of the remedy for which the party has liability.

Stated simply, Section 11 of the Draft RADD should be deleted because it is irrelevant to the purposes of the RADD and the requirements stated in the section are impermissibly vague and unenforceable.

**3. The Draft RADD should be revised to make it clear that ADEQ’s publication of the “Final RADD” and any related response to public comments do not constitute an administrative decision that is subject to immediate appeal.**

The Notice and Fact Sheet that ADEQ published with the Draft RADD announces a 30 day period for the submission of public comments, sets a date for a formal public hearing, and identifies a set of documents that “comprise the administrative record” for the RADD. The Fact Sheet also states that:

Submitting written comments to ADEQ or making oral statements on the record at any formal public hearing on the RADD provides individuals with legal standing to appeal a final Department decision. Only parties with legal standing may appeal a decision.

ExxonMobil and Helena Chemical Company agree that publishing the Draft RADD, establishing a publicly available “administrative record” of relevant documents, holding a public

hearing, and inviting public comments are all appropriate steps to take in order to encourage and facilitate public participation in the remedy selection process. These steps are good public policy; and they help assure continued consistency with the public participation provisions of the National Contingency Plan. Taking steps to encourage public participation, however, does not make ADEQ's decision on the RADD an appealable administrative action. ExxonMobil and Helena Chemical Company are not aware of any instance in which a RADD issued by ADEQ has been appealed; and the companies are not aware of any statutory provision or administrative rule that would allow or require interested parties to pursue an immediate appeal from a Department decision to issue a "final RADD."

The language quoted above from the Notice and Fact Sheet published with the draft RADD contains language about standing to appeal a RADD, but that language appears to have been copied from standard form language used in the notices that the Department publishes when it issues draft permits for public comment. Indeed, the legal limitation on standing to appeal that is discussed in the language quoted above applies only to third party appeals of permitting decisions. *See* Ark. Code Ann. § 8-4-205(b); APCEC Regulation No. 8, Reg. 8.214. It is clear that the final RADD will not constitute a permit, and its issuance will not constitute a permitting decision. *See* APCEC Regulation No. 8, Reg. 8.103(AA) & (BB) (definitions of "permit" and "permitting decision").

ExxonMobil and Helena Chemical respectfully submit that the "final RADD" and the response to comments that accompanies the "final RADD" should state clearly whether ADEQ views the issuance of the final RADD as an appealable administrative action. Unless this question is clarified in unequivocal terms, parties with interest in the matter may feel that they have no choice but to appeal the issuance of the "final RADD" in order to preserve their

opportunity to resolve any potential differences with the Department regarding the RADD.

ExxonMobil and Helena Chemical believe that those differences are more appropriately resolved when ADEQ seeks to order a party to implement an element of the remedy selected in the RADD, or at the time ADEQ seeks to recover costs that the Department has expended from the Remedial Action Trust Fund to implement some element of the remedy selected at the RADD.

At that time a party's concerns about the relevant provisions of the RADD would be concrete rather than hypothetical, and ripe for either negotiation or adjudication.